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93-158

Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

Orlon R. Hill, PETITIONER

VS.

United States Army, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

APPENDIX B TO
PETITION FOR WRIT OF CERTIORARI

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

ORLON R. HILL, Appellant,	)	DOCKET NUMBER DA-1221-92-0394-W-1
V.	)	
DEPARTMENT OF THE ARMY, Agency.	)	DATE: June 30, 1992

Orlon R. Hill, Harker Heights, Texas, pro se.

Thaddeus A. Podbielski, Esquire, Fort Hood, Texas, for the agency.

BEFORE

William W. Carnes
Administrative Judge

INITIAL DECISION

Orlon R. Hill filed with the Board on March 6, 1992,[1] what appeared to be an individual

1 This appeal was filed with the Clerk of the Board in Washington, D.C., on March 6, 1992. Because individual right of action appeals should be filed in the appropriate Board regional office, this appeal was subsequently forwarded to the Dallas Regional Office for processing, and was not received until April 20, 1992.

right of action (IRA) appeal, after having first sought corrective from the Office of Special Counsel regarding alleged reprisal for whistleblowing in connection with his demotion on May 19, 1991.

For the reasons set forth below, the appeal is DISMISSED.

ANALYSIS AND FINDINGS

The appellant previously appealed this same demotion action to the Board.

The appellant was formerly a GM-13 Supervisory Management Analyst and the Chief of the Army Organization Efficiency Review Division at Fort Hood, Texas. On May 19, 1991, he was demoted by adverse action to the position of GS-11 Program Analyst. On June 10, 1991, the appellant appealed that action to the Board.

Following a hearing on that appeal, Administrative Judge Marie A. Malouf sustained all charges of misconduct and affirmed the

change-to-lower-grade action.[2] *See Hill v. Department of the Army*, MSPB Docket No. DA07529110549, Initial Decision issued October 10, 1991, see copy in appeal file, tab 7(4e). In that appeal, the appellant raised as affirmative defenses, inter alia, discrimination on the basis of handicap and reprisal for protected whistleblowing disclosures. Judge Malouf reviewed the evidence on these issues and found that none of the affirmative defenses were proven. Id.

After receiving that Initial Decision affirming his demotion, the appellant filed a petition for review with the Board under the provisions of 5 C.F.R. SSSS 1201.114-.117. The Initial Decision became the Board's final decision when, on January 24, 1992, the Board denied the appellant's petition for review.[3]

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2 Judge Malouf found that a preponderance of evidence supported the four charges against the appellant. These misconduct charges included the appellant having taken reprisal against four subordinate female employees in his division for having pursued discrimination complaints, creating a threatening and hostile work environment, and aggravating an offensive work atmosphere. See appeal file, tab 7(4e).

3 Subsequent to this final action by the Board, the appellant has apparently filed a petition with the Equal Employment Opportunity Commission for further administrative review of the discrimination issues raised in that appeal.

Hill v. Department of the Army, 52 M.S.P.R. 124 (1992) (Table), see copy in appeal file, tab 7(4b).

The appellant filed a complaint with the Office of Special Counsel alleging that his demotion was a prohibited personnel practice.

The record shows that the appellant also filed a complaint with the Office of Special Counsel (OSC) about this same matter. He provided with the current appeal copies of two letters from OSC, dated January 15, 1992, showing that he had filed a complaint with that agency alleging that his May 19, 1991, demotion was in reprisal for whistleblowing and was discriminatory on the basis of a handicapping condition.[4] *See* appeal file, tab 1(B). The notices advised the appellant that OSC was that day closing its file on his complaint, and that, because he had alleged

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4 The complaint filed with OSC by the appellant has not been provided; however, this correspondence from the OSC, submitted by the appellant, clearly shows the subject of his complaint was the demotion of May 19, 1991, and his allegations of reprisal for whistleblowing and handicap discrimination. See appeal file, tab 1(B).

reprisal for whistleblowing, if he was not satisfied with OSC's action on his complaint, he had 65 days from the date of that notice to request corrective action from the Board. *Id.* The current appeal was thus filed with the Board, based on these notices from OSC.

The agency challenged the Board's jurisdiction to review this matter as an IRA appeal.

In response to the appeal, the agency submitted, inter alia, a motion to dismiss. Appeal file, tabs 5 & 7. It argued that identical issues were presented to the Board in connection with the appellant's prior appeal, heard and decided by Judge Malouf, and which, as of January 24, 1992, was now a final decision of the Board. The agency argued that this matter is res judicata, and should be dismissed.

Because of the background evident in this appeal, and the agency's motion to dismiss, the appellant was issued an order on May 18, 1992, to show cause why this appeal should not be dismissed. See appeal file, tab 6. He was advised that he bears the burden of proof on issues of jurisdiction and provided an

opportunity to respond. The appellant responded to this Order. See appeal file, tab 8.

He contended that this matter was not res judicata, because Judge Malouf had not properly considered all of the evidence on his case and she had improperly conducted the hearing. He argued generally that the evidence, if properly considered, would show that he was discriminated against due to his handicapping condition, and that the agency officials had demoted him in reprisal for his protected whistleblowing activities. *Id.* He contended that the whistleblowing reprisal issue had not properly been before the Board in the appeal decided by Judge Malouf, because he had not then taken the matter before OSC. Thus, he argued, citing *Knollenberg v. MSPB,* 953 F.2d 623 (Fed. Cir. 1992)[5] that since he has now completed the

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5 In *Knollenberg,* the court affirmed the Board's dismissal, for lack of jurisdiction, an appeal involving a nonselection for a position, alleged to be in reprisal for whistleblowing. Because that action was not an otherwise appealable matter, it was appealable to the Board only as an IRA appeal. Since the appellant had not first sought corrective action from OSC, the Board lacked jurisdiction to accept that matter as an appeal at that time. *Knollenberg,* 953 F.2d at 625-26.

complaint process with OSC, this is a matter properly before the Board as an IRA appeal. The remainder of the appellant's arguments relate primarily to the merits of his claim raised in his prior appeal (DA07529110549) of the demotion action and his disagreement with the findings by Judge Malouf. Id.

The personnel action that is the subject of this appeal is an otherwise appealable action.

The Board's regulations implementing the provisions of the Whistleblower Protection Act of 1989 (WPA) are found in 5 C.F.R. Part 1209. There are two types of appeals covered by these provisions -- (1) an otherwise appealable matter which includes an allegation of reprisal for whistleblowing, and (2) an IRA appeal. 5 C.F.R. SS 1209.2 (1992). As discussed by the court in *Knollenberg*, an IRA appeal involves a matter which cannot be appealed to the Board, except for the new provisions of the WPA. *Knollenberg*, 956 F.2d at 525-26. In order for the Board to have jurisdiction in an IRA appeal, the appellant must have first sought corrective action from

OSC on his or her complaint that the personnel action involved was the result of reprisal for protected whistleblowing, as defined by 5 U.S. C. SS 2302 (b) (8) *Id.; see also* 5 C.F.R. SSSS 1209.1 -.5 (1992).

For an otherwise appealable action, an appellant may choose either to seek corrective action from the OSC before appealing to the Board or to file the appeal directly to the Board. See 5 C.F.R. SSSS 1209.2(b)(2), .5(b) (1992). The personnel action involved in this appeal, the prior appeal, and the complaint before OSC, is the appellant's change to lower grade on May 19, 1991. Such an adverse action demotion does not have to first be taken before OSC before it can be appealed to the Board, like an IRA appeal must.[6] A demotion is an action otherwise appealable to the Board, with or

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6 In an IRA appeal of an action that is not otherwise appealable to the Board, the only issue presented to the Board for adjudication is the issue of whether the personnel action in question was taken (or not taken) in reprisal for the appellant's whistleblowing disclosure(s) protected by 5 U.S.C. SS 2302(b)(8), and does not include issues of alleged discrimination. *See Marren v. Department of Justice,* 51 M.S.P.R. 632, 638-39 (1991).

without allegations of whistleblowing reprisal. *See* 5 U.S.C. SS 7511-7513; 5 C.F.R. SS 1201.3 (1992) . Thus, when first appealed to the Board in June 1991, the matter was properly held to be within the Board's jurisdiction and was adjudicated on the merits, along with all appropriate affirmative defenses raised, including the claim that this action was taken in reprisal for whistleblowing.

This appeal is res judicata.

The doctrine of res judicata applies to prevent repetitious litigation on the same cause of action. *See, e. g. , Wilson v. Turnage,* 791 F.2d 151, 156 (Fed. Cir.), cert. denied, 479 U.S. 988 (1986) . An issue is res judicata if there is identity of the cause of action as well as identity of parties. *See, e.g., Cody v. Department of Transportation,* 17 M.S.P.R. 572 (1983) . Where there has been a final judgment on the merits of an action, it precludes either of the parties from relitigating issues that could have been raised in the prior appeal. *See, e.g., Wilson* v. United *States Postal Service,* 32 M.S.P.R. 2 4 4 ,

247-48 (1987).

On January 24, 1992, the Board issued its final order on the appellant's prior appeal of his demotion action. In that appeal, the issue of reprisal for whistleblowing, along with several other issues, was raised. It was heard and adjudicated by the judge in that case. The parties in that prior appeal were the same as in the instant appeal.

It is clear that the appellant is now attempting to have the same matter he previously appealed reconsidered by the Board. He states in this appeal that what he seeks is to have the Board "reopen, reconsider, and issue a new final decision" on that prior appeal (DA07529110549) . See appeal file, tab 8, at 10. The appellant's disagreement with the administrative judge's analysis and findings regarding the evidence in that appeal, as well as his challenges to the way she conducted that proceeding, are matters that were or could have been challenged in that appeal and in the petition for review.

When the appellant received the Board's

Order of January 24, 1992, informing him that his petition for review was denied, it also advised him that it was the "Board's final order in this appeal" and that Judge Malouf's initial decision was now the Board's final decision. *See Id.* at tab 7 (4b) . While the appellant was given the right to pursue further administrative review from the Equal Employment Opportunity commission on the discrimination issue, that review pertains only to the claims of discrimination, not whistleblowing issues.

I find that the matter the appellant now seeks to have the Board review is the same action that was adjudicated by the Board in his prior appeal (DA07529110549) . Moreover, the issue of whether the demotion action was in reprisal for whistleblowing was addressed and found to be unsupported by the evidence. See pages 31-34 of prior initial decision, at appeal file, tab 7 (4e). Because the Board issued a final decision in that appeal, I find that the appellant is precluded by the doctrine of res judicata from bringing this same matter before the Board again. The

fact that OSC may have issued the appellant a notice which, inter alia, also advised him that he could further pursue the matter before the Board under the provisions of 5 C.F.R. Part 1209, does not itself grant the appellant a new right of appeal. Where a final decision on the same matter has already been issued by the Board, the Board is not bound to accept the subsequent appeal of the same action as a matter within its appellate jurisdiction based on such a notice from OSC. *See Lapedis v. Department of Health and Human Services*, 47 M.S.P.R. 337, 342, *aff'd*, 949 F.2d 403 (Fed. Cir. 1991) (Table).

In this case, the appellant has previously appealed his demotion by the Department of the Army to the Board, as an otherwise appealable action. The instant appeal involves the same cause of action, the same parties, and the same whistleblowing issue already litigated and decided by the Board Accordingly, this appeal is dismissed as res judicata.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: William W. Carnes

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on August 4, 1992, unless a petition for review is filed by that date or the Board in that first reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or thc federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached document was sent by regular mail this day to each of the following:

Appellant

Mr. Orlon R. Hill
108 West Briarwood Lane
Harker Heights, TX 76543

Agency Representative

Thaddeus A. Podbielski, Esquire
Labor Counselor
Office of the Staff Judge Advocate
HQ, III Corps an Fort Hood
Fort Hood, TX 76544-5056

Other

Ms. Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street, NW., Room 7412
Washington, DC 20415

June 30, 1992
(date)

_____
Rolayne Campau
Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ORLON R. HILL, Appellant, V. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DA1221920394-W-1 DATE: NOV 5, 1992

Orlon R. Hill, Harker Heights, Texas, pro se.

Thaddeus A. Podbielski, Esquire, Fort Hood, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on June 30, 1992, because it does not meet the criteria for review set forth at 5 C.F.R. SS 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R.

SS 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final Decision in your appeal if the court has jurisdiction. See 5 U.S.C. SS 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. SS 7703(b)(1).

FOR THE BOARD:

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Orlon R. Hill
108 West Briarwood Lane
Harker Heights, TX 76543

By regular mail to:

Thaddeus A. Podbielski, Esquire
Department of the Army
Office of the Staff Judge Advocate
HQ, III Corps and Fort Hood
Fort Hood, TX 76544-5056

Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7412
Washington, DC 20415

Merit Systems Protection Board
Dallas Regional Office
1100 Commerce Street, Room 6F20
Dallas, TX 75242

By hand to:

Office of Special Counsel
1120 Vermont Avenue, N.W.
Washington, DC 20005

N O V - 5 1992

(Date)

Washington, D.C.

Robert E. Taylor
Clerk of the Board